IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON, Plaintiff, v. NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL *et al.*, Defendants.	Case No. 18-cv-4483 (GHW) (RWL)

DEFENDANT NFLMC'S RESPONSE TO PLAINTIFF'S OBJECTIONS
TO MAGISTRATE JUDGE'S REPORT & RECOMMENDATION

PRELIMINARY STATEMENT[1]

Plaintiff, a former professional football player currently receiving disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("the Plan"), brings this case against the Retirement Board responsible for administering the Plan, as well as the National Football League Management Council ("NFLMC"), the collective bargaining representative of the NFL member teams, and the National Football League Players Association ("NFLPA"), the NFL players' union. Through this action, Plaintiff seeks a higher award of benefits based on his allegation that the Retirement Board failed to define the standard for players seeking to reclassify their level of benefits in the Plan's summary plan description (SPD). As Magistrate Judge Lehrburger found in a thoughtful and well-reasoned Report and Recommendation spanning 60 pages (the "Report," ECF No. 90), however, Plaintiff's claims fail in their entirety and should be dismissed with prejudice.

Plaintiff asserts three claims against the NFLMC: the NFLMC failed to monitor the individuals it appointed to the Retirement Board in violation of ERISA (Count III); invalidation of a 2017 amendment, to the extent it applies to the Plan (Count IV) [2]; and violation of ERISA due to a limitations provision in the Plan (Count V). Each of these claims is premised on Plaintiff's unsupported and inflated view of the NFLMC's alleged fiduciary duties, which Plaintiff insists arise out of the NFLMC's obligation under the Plan to appoint members to the Retirement Board. Without any support, Plaintiff claims that the NFLMC, together with the NFLPA, should have acted as a "super" board, second-guessing the substantive decisions of the Retirement Board—including decisions regarding benefits classification and the content of the SPD—and removing

[1] The NFLMC incorporates the procedural posture and facts of this case set forth in detail in Judge Lehrburger's Report and Recommendation. (*See* ECF No. 90 at 2-13).

[2] Plaintiff does not object to the dismissal of Count IV. (*See* ECF No. 91 at 1 n.1.)

appointees who allegedly breached their fiduciary duties in making those substantive decisions. As Magistrate Judge Lehrburger recognized, however, to the extent the NFLMC has any fiduciary duty, it is limited to the appointment of trustees.

Plaintiff's Objections to Magistrate Judge's Report and Recommendation (the "Objections," ECF No. 91) are nothing more than a last ditch effort to resuscitate his claims in the face of clear authority refuting Plaintiff's legal theories. Plaintiff's Objections misconstrue the scope of fiduciary duties in the multi-employer pension plan context and completely fail to address the well-established authority cited by Judge Lehrburger in the Report. The NFLMC hereby submits the following response to Plaintiff's Objections, and respectfully requests that this Court adopt the Report and dismiss all claims against the NFLMC with prejudice.

DISCUSSION

I. Plaintiff's Attempt to Impose Broad Fiduciary Duties on the NFLMC is Wholly Unsupported by Authority

As Judge Lehrburger noted, in a multi-employer pension plan such as the Plan in this case, an independent board of trustees is appointed by the union and management. (Report at 24.) The board of trustees—the Retirement Board in this case—is the "named fiduciary," responsible for the administration and management of the pension plan. (*Id.*) However, ERISA contemplates both named and *de facto* fiduciaries. *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 565 (S.D.N.Y. 2011). A *de facto* fiduciary is not designated by the terms of the pension plan, but rather is determined by any discretionary authority and control the alleged fiduciary has over the administration of the plan. 29 U.S.C. § 1002(21)(A). A *de facto* fiduciary's duties are limited: "a person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control." *Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986). Accordingly, where a party has no authority

or control to act, it cannot be held liable for failing to take that action. *Bear Stearns*, 763 F. Supp. 2d at 566.

As Judge Lehrburger found, the only "authority" or "control" the NFLMC had with respect to the Plan was the appointment of the management members of the Retirement Board. (Report at 34.) Under the law, therefore, the NFLMC can be a fiduciary to the Plan only with respect to appointing the management members of the Retirement Board. (*Id.*) *See also Sommers*, 793 F.2d at 1460 ("[I]f an employer and its board of directors have no power with respect to a plan other than to appoint the plan administrator and the trustees, then their fiduciary duty extends only to those functions."). Plaintiff does not and cannot allege that the NFLMC breached any duty in appointing members to the Retirement Board. (*See* Report at 37-38 ("[T]o the extent that the [NFLMC] had fiduciary duties under the terms of the Plan, it *fulfilled* those duties.").)

Plaintiff disregards the NFLMC's limited role in appointing members to the Retirement Board and instead argues that the NFLMC maintained a broad duty to oversee appointees' decisions. (Objections at 22.) Yet, as Judge Lehrburger determined, Plaintiff's complaint "fails to allege any facts to establish that the [NFLMC] either possessed or exercised (or failed to exercise) any [such] broader powers." (Report at 34.) Because the NFLMC had no such broad power, it cannot be held liable for its appointees' substantive decisions, including decisions with respect to reclassification of benefits or content of the SPD. *See Bear Stearns*, 763 F. Supp. 2d at 566; (Report at 36 ("The mere fact that the [NFLMC] can appoint and remove three members of the Retirement Board does not suffice to make the [NFLMC] liable for the Retirement Board's substantive decisions.").). Plaintiff cites no authority supporting the imposition of broad fiduciary liability on *de facto* fiduciaries whose only authority with respect to a pension plan is appointing and removing trustees.

Significantly, Plaintiff completely ignores the Supreme Court precedent expressly relied on by Magistrate Judge Lehrburger addressing the fiduciary duties of appointing entities in the multi-employer pension plan context. Under this precedent, appointed representatives are prohibited from administering a pension plan in the interest of the party that appointed them, and the appointing parties are prohibited from directing or supervising the decisions of their appointees. *See N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 330 (1981). Moreover, as Judge Lehrburger recognized, Plaintiff's formulation of the NFLMC's broad fiduciary duties are implausible because "[i]f every employer or union that appoints plan trustees were themselves deemed an ERISA fiduciary liable for every alleged act or omission of those trustees, the whole system of multi-employer pension plans would become grossly inefficient." (Report at 35.)

Because all claims against the NFLMC are based on a faulty premise as to the scope of the NFLMC's fiduciary duties, those claims must be dismissed.

II. Plaintiff Misconstrues an Appointing Fiduciary's "Duty to Monitor"

Nevertheless, Plaintiff contends that the NFLMC breached a duty to monitor its appointees to the Retirement Board. In particular, Plaintiff insists that the NFLMC was obligated to correct its appointees' alleged breaches of duty—in this case, related to reclassification of benefits and the substantive content of the SPD—and remove its appointees unless the alleged breaches of duty were remedied. (Objections at 21.) Plaintiff's expansive view of the NFLMC's duty completely misconstrues the limited scope of an appointing entity's duty to monitor (Report at 25), which, as Judge Lehrburger explained, is limited to ensuring that the appointees are performing their fiduciary obligations, such as attending meetings and casting votes. *See id.; see also Liss v. Smith*, 991 F. Supp. 278 (S.D.N.Y. 1998); *Sommers*, 793 F.2d at 1459-60. Here, the complaint is devoid of *any* allegations that the NFLMC failed to monitor its appointees in a manner that falls within the limited scope of that duty. (*See* Report at 38 ("[T]he Complaint does not allege that the

[NFLMC] failed to monitor whether its appointed members to the Retirement Board attended meetings, cast votes, or otherwise carried out their duties.").)

Moreover, imposing a broader duty on an appointing entity in the multi-employer pension plan context, as Plaintiff urges to Court to do here, would run afoul of *Amax Coal*'s prohibition against an appointing entity directing or supervising the decisions of its appointees. *AMAX Coal Co.*, 453 U.S. at 330. Given this prohibition, it is no surprise that Plaintiff does not cite a single case to support his expansive view of the duty to monitor appointed trustees in a multi-employer plan. Indeed, every case since *AMAX Coal* case addressing the duty to monitor in the multi-employer plan context recognizes the limitation of that duty. *See, e.g., Int'l Bhd. of Elec. Workers, Local 90 v. Nat'l Elec. Contractors Ass'n*, No. 3:06-cv-2 (SRU), 2008 WL 918481, at *6 (D. Conn. March 31, 2008); *see also Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1466 n.10 (4th Cir. 1996); *Johnson v. Evangelical Lutheran Church in Am.*, No. 11-23 (MJD/LIB), 2011 WL 2970962, at *5 (D. Minn. July 22, 2011); *Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 881-82 (N.D. Ill. 2009). Plaintiff does not even bother addressing this precedent. Instead, he continues to rely on inapposite single-employer "stock drop" cases to support his fantastical view of the duty to monitor.

In any event, Plaintiff's duty to monitor claim against the NFLMC also fails because, as Judge Lehrburger concluded, Plaintiff has not adequately pleaded a breach of fiduciary duty claim against the Retirement Board. *See Bear Stearns*, 763 F. Supp. 2d at 580 ("A claim for breach of the duty to monitor requires an antecedent breach to be viable . . . [and] [w]ith no antecedent breach by the monitored parties in this case, . . . [the] duty to monitor claim fails.").

III. Count V Fails to State a Claim Against the NFLMC

As Judge Lehrburger concluded, Count V, which seeks to void the Plan's limitation provision on the theory that the provision violates ERISA, is time-barred, and therefore must be

dismissed. (Report at 57-58.) Moreover, because Plaintiff has failed to state a claim against the NFLMC for breach of fiduciary duty, Count V also must be dismissed as to the NFLMC.

CONCLUSION

For the reasons stated above, as well as those set forth in the NFLMC's memoranda in support of its motion to dismiss (ECF Nos. 53, 74), the NFLMC respectfully requests that this Court adopt Judge Lehrburger's findings in the Report and dismiss Plaintiff's complaint for failure to state a claim.

Dated: September 26, 2019

Respectfully submitted,

/s/ Stacey R. Eisenstein

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